Supreme Court, U. S.
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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1978

No. 78-879

RICHARD J. RABBITT,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI

To the United States Court of Appeals
for the Eighth Circuit

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To the United States Court of Appeals for the Eighth Circuit

Petitioner, Richard Rabbitt, respectfully prays that a writ of certiorari be issued to review the judgment and opinion of the United States Court of Appeals for the Eighth Circuit, No. 77-1677.

OPINION BELOW

The opinion of the Court of Appeals is not yet reported and is reprinted as Appendix A.

JURISDICTION

The judgment of the Court of Appeals was entered on September 5, 1978. A timely petition for rehearing or transfer en banc was denied on October 27, 1978. Petitioner's motion to amend the mandate was denied on November 14, 1978. This petition for certiorari was filed within thirty days of October 27, 1978. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

PRELIMINARY STATEMENT

Petitioner, a former Speaker of the Missouri House of Representatives, was indicted and convicted on all of fifteen counts involving three separate subject matters. Counts I-XI related to his dealings with an architectural firm and its procurement of state contracts from 1967 through 1976. Counts XII-XIV involved an auto-dealer tax bill pending on the legislature in 1973. Count XV charged attempted extortion in 197[illegible] in connection with a bill regulating the size of trucks.

The Court of Appeals held that Petitioner's in trial motions for judgment of acquittal on Counts I-XI should have been sustained because the Government's evidence failed to prove any federal crime, reversed the convictions on those counts, and remanded the case for re-sentencing on Counts XII-XV. Petitioner sought a rehearing or transfer en banc on the question whether the case should be remanded for a new trial on the four affirmed counts. When that was denied, Petitioner unsuccessfully moved to amend the mandate so as to permit the trial court to entertain his motion for new trial on those counts.

QUESTIONS PRESENTED

1. When a Court of Appeals holds that a motion for judgment of acquittal should have been sustained as to all counts involving one subject matter, is that court required by Section 2106 of Title 18 and due process either to order a new trial on the remaining counts or to direct the trial court to entertain a motion for such new trial?

2. Does the indiscriminate introduction of local constitutional provisions, statutes, ordinances, disciplinary rules, and codes of conduct into federal mail fraud prosecutions violate due process when the matter introduced is general in tenor and the relevance is slight?

UNITED STATES CONSTITUTION, STATUTES AND RULES INVOLVED

United States Constitution, Amendment Five

No person shall . . . be deprived of life, liberty, or property, without due process of law; . . . .

Section 2106 of Title 18, U.S.C.

The Supreme Court or any other court of appellate jurisdiction may affirm, modify, vacate, set aside or reverse any judgment, decree, or order of a court lawfully brought before it for review, and may remand the cause and direct the entry of such appropriate judgment, decree, or order, or require such further proceedings to be had as may be just under the circumstances.

Section 1341 of Title 18 U.S.C.

Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, * * * for the purpose of executing such scheme or artifice or attempting to do so, places in any post office or authorized depository for mail matter, any matter or thing whatever * * * or takes or receives therefrom, any such matter or thing, or knowingly causes to be delivered by mail * * * any such matter or thing, shall be fined * * * or imprisoned * * *.

Section 1951 of Title 18 U.S.C.

Whoever in any way or degree obstructs, delays, or affects commerce or the movement of any article or commodity in commerce, by * * * extortion or attempts or conspires to do so * * * shall be fined * * * or imprisoned * * *.

Rule 403 Fed. R. Evid.

Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.

STATEMENT OF THE CASE

The Factual Background

This case involves Petitioner's conduct as a Missouri State legislator. He was first elected to the House of Representatives in 1960 and served as majority floor leader from 1967 through

1972, when he became Speaker of the House. He remained Speaker until 1976, when he ran for Lieutenant Governor. Concededly, both as majority floor leader, and even more so as speaker, he had the power to influence legislative pending in the House.

In the first ten counts of the indictment, the Government charged that, "[f]rom about the beginning of 1967, to on or about December 31, 1976," the defendant "devised . . . a scheme and artifice to defraud:

> "(a) The State of Missouri, its citizens, and members of the Missouri House of Representatives of their right to the conscientious, loyal, faithful, disinterested, and unbiased services, and actions in the performance of official duties . . . and to do so free from corruption, extortion, partiality, willful omission, dishonesty, official misconduct, conflict of interest and fraud;"
>
> "(b) The State of Missouri, its citizens, and members of the Missouri House of Representatives of their right to have the State's business and its affairs conducted honestly, free from deceit, craft, trickery, extortion, corruption, fraud, dishonesty and conflict of interest, and in accordance with the laws of the State of Missouri;"
>
> "(c) The State of Missouri, its officials, and employees, of their right to be aware of all pertinent and relevant facts when analyzing and entering into contracts with persons and businesses doing business and seeking to do business with the State of Missouri, and of their right to be aware of all pertinent and relevant facts when determining whether and what amounts of money should be paid to persons and businesses doing business and seeking to do business with the State of Missouri."

The substance of the scheme alleged was that defendant would assist an architectural firm to obtain architectural service

contracts from the State of Missouri in return for 10% of the fees which the firm received from the state. These contracts were awarded by the Division of Design and Construction, a part of the executive branch (T. 352-53).

Count XI charged extortion under the Hobbs Act on the basis of the same conduct.

In Count XIV, the government alleged that, "[f]rom on or about April, 1973, to on or about July, 1973," the defendant "devised" a scheme and artifice to "defraud" the same "victims" out of the same "rights" by soliciting money from an auto dealers' association "to ensure passage" of a certain piece of legislation.

Counts XII and XIII alleged that defendant "extorted" this money from the auto dealers.

Count XV was a claim of attempted extortion as to a bill desired by the trucking industry.

With regard to the extortion and mail fraud charged in the first eleven counts, the partners in the architectural firm of Berger-Field testified that beginning in 1967, Rabbitt demanded 10% of their fee in return for introducing them to the Chief of the Division of Design and Construction, who awarded architectural service contracts (T. 153-56). The fee for state work was a flat 6% of the construction cost, with no competitive bidding (T. 353-54). Berger-Field got two jobs in 1967 (T. 211-13).

A sheet of paper introduced by the government purportedly showed "cash payments" to Rabbitt of $10,500 from 1967-73 (Govt. Exh. 3; T. 107). Defendant testified that he received campaign contributions totalling about $2400 from the architects during this period, but denied that he had made any demands in connection with introducing the architects to the Chief of Design or Construction or that there was any agreement that he was to receive any part of Berger-Field's fees, or that the

$2400 was pursuant to any "10% arrangement" (T. 970, 992-93). In 1973, Berger-Field received another job (T. 282). The architects testified that, in that year, defendant told them to disguise the payments as monthly retainer fees of $500 made out to Joseph Dickerson, one of Defendant's law partners (T. T. 112-13, 205, 331). These payments were made for two years (Govt. Exh. 3). Dickerson, testifying for the government, did do some legal work for the architects, and was prepared to do whatever work they had (T. 402-407). The architects admitted that Berger-Field could get state contracts without defendant and that they did not pay Rabbitt out of "fear of economic harm" (T. 136-37, 216-18, 300-302).

Counts XII-XIV charged extortion and mail fraud with regard to a bill involving an ad valorem tax on auto dealers. A representative of the St. Louis Auto Dealers Association asked Rabbitt "what we could do to expedite the bill and he recommended employing John Connaghan" (T. 465). Connaghan demanded a "fee" of $20,000, which was paid (T. 442, 470, 498). He did no work for this fee (T. 519). He claimed that he gave Rabbitt $5000 in cash, at Rabbitt's offices in St. Louis, on a day when it was admitted that Rabbitt was presiding over the state legislature over 100 miles away (T. 527-28, 731, 1000-1001). Connaghan did give defendant a check for $2000, which defendant testified was a legitimate referral fee, and also gave defendant's brother a check for $6800, which defendant's brother testified was also represented as referral fees (T. 522, 812, 818-19, 1004-1005). Both the government's evidence and the defendant's showed that, at the time Connoghan demanded and received $20,000, the bill was in fact proceeding expeditiously (T. 74, 720-21, 857, 874-83).

With regard to the attempted extortion charged in Count XV, a lobbyist testified that, in December 1973, he went to see Rabbitt about a bill permitting larger trucks on the highways: "[W]e visited awhile, and at some point Mr. Rabbitt indicated

that he had added some persons to the law firm and needed some more law business from maybe the truckers or trucking industry" (T. 598). He further claimed that in "mid January of 1974" he went up to Rabbitt in the hallway of the capitol and asked him why the bill had not been referred to committee. "He said, 'Because I haven't gotten any law business' " (T. 599-600). Defendant vehemently denied these conversations (T. 1010, 1015). The bill in fact was timely assigned to committee (T. 610-12).

The Procedural Background

Defendant timely filed a Motion to Dismiss and a Motion to Strike Surplusage, both of which were overruled. He also filed a Motion to Sever the Berger-Field counts (I-XI), the auto dealer counts (XI-XIV), and the big truck count (XV). This was denied. At the close of the government's case, and again at the close of all of the evidence, defendant, filed Motions for Judgment of Acquittal for failure to make a submissible case. These were denied. As to Counts I-XI, these motions were based on the identical grounds on which the Court of Appeals later reversed.

Defendant was found guilty on all 15 counts. He was sentenced to three years on the Berger-Field counts, a consecutive three years on the auto dealer counts, and a consecutive year on the big truck count. The Court of Appeals held that the evidence on the Berger-Field counts did not prove mail fraud or extortion, and reversed on those counts. It remanded the other counts for resentencing. A timely Petition for Rehearing or, in the Alternative, Transfer to the Court En Banc was "denied" on October 27, 1978. Thereafter, Petitioner filed a Motion to Amend the Mandate to direct the trial court to permit the filing of a Motion for New Trial on the remaining counts. This, too, was "denied".

REASONS WHY THE WRIT SHOULD BE GRANTED

I

When a Court of Appeals holds that a motion for judgment of acquittal should have been sustained as to all counts involving one subject matter, is that court required by Section 2106 of Title 18 and due process either to order a new trial on the remaining counts or to direct the trial court to entertain a motion for such new trial?

In a multi-count criminal case, when the trial court, contrary to Rule 29(a) F.R.CR.P., fails to order a judgment of acquittal on some of the charges, and permits the jury to find the defendant guilty of the crimes alleged in those charges, the fairness of the trial on the remaining counts becomes highly suspect. This is true for a variety of reasons:

A. **The jury has been misguided and misdirected.**

The trial court's misapprehension of law results in the submission of the invalid charges to the jury for its deliberation; and to the extent that the jury deliberates upon them, its attention is diverted from consideration of the other counts. Much more serious, the court's instructions are necessarily guilty of misdirection in that they authorize and permit the jury to find that the defendant's conduct, under the invalid charges, constitute criminal behavior when that is false. In the case sub-judice, the jury found petitioner guilty of eleven non-extant federal crimes (Counts I-XI).[1]

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[1] The gravity of these charges in the eyes of the jury cannot be overestimated. They cover ten pages of the indictment which was given to the jury to aid it in its deliberations. The Government's case in-chief on these counts covers nearly 400 pages of the transcript and includes 53 exhibits. The prosecution also introduced rebuttal testimony related only to these charges.

When a jury labors under the false belief that the defendant's conduct was criminal, as charged in the invalid counts, it is the same as otherwise making him out as a man possessed of criminal propensity; and it is impossible to measure the prejudice that infects the jury's evaluation of the defendant's guilt or innocence under the remaining counts, *Cf. Michelson v. United States*, 335 U.S. 469 (1948). Lawyers know instinctively that an accused has not received a fair trial when he has been indicted, tried, and convicted on all fifteen counts, eleven of which were invalid.

Mere reversal of the invalid convictions cannot remove the prejudice which more than likely infected the jury's consideration of the other counts. Nor does such reversal restore to a defendant the rights he was denied at the close of the Government's case when his motion for judgment of acquittal was improperly overruled.

Under a proper ruling, a defendant may move for a mistrial. If granted, he would be retried on the remaining counts only. If denied, he may move to strike the evidence admitted under the invalid counts. In each instance, the grant or denial of the relief sought is vested in the discretion of the trial judge and will be overturned only upon a clear showing of abuse. If both motions are denied, the accused is rightly entitled to proper limiting instructions. No one can say whether the end result of the case would have been different or the same if one or another of these corrective remedies had been granted.

B. **The evidence is prejudicial.**

When an appellate tribunal reverses some, but not all convictions, the judicial inquiry researches the record to determine whether the evidence and instructions relating to the reversed convictions deprived the accused of a fair trial on the affirmed

counts. Since the appellant could not foresee which, if any, of his convictions would be reversed, his first opportunity to be heard with respect to his entitlement to a new trial comes in his petition for rehearing or transfer en banc.[2] In this, he is limited to fifteen pages and is denied oral argument.

In the case sub judice, the prejudicial effect of the evidence admitted under the invalid counts can be described in the words of Eighth Circuit Court of Appeals:

> "The evidence clearly shows that Rabbitt acted unethically and violated his canons as a lawyer, a candidate disclosure statute requiring disclosure of fees received during the preceding twelve months, and possibly a Missouri law rendering 'partiality' or abuse in public office unlawful."

Yet that tribunal found that this evidence, repeatedly drummed into the jury and spread over the indictment, did not prejudice the trial on the remaining counts. This is to say nothing about the other evidence which painted defendant as a greedy, money-grabbing public official.

The opinion of the appellate court is rather opaque concerning the basis upon which it has seemingly ruled that the questioned evidence either was relevant to the counts it affirmed, or that the trial court would, or should, admit it in a retrial of those counts. (Later, we will demonstrate that this evidence is irrelevant to the other counts.)

Moreover, the appellate tribunal is grievously mistaken in ruling that the candidate disclosure statute was admissible with

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[2] Under Rule 33 F.R.CR.P. petitioner could have moved for a new trial within 7 days after verdict. The filing of such a motion would have been utterly futile and unrealistic. Neither the petitioner nor the trial judge could anticipate how the court of appeals would rule; and it would have been completely unavailing and a waste of the court's time to move for a new trial on grounds repeatedly overruled—i.e., that the first eleven counts were both invalid and prejudicial when the court believed them to be valid.

respect to the valid counts. This Act made it a misdemeanor for a candidate to fail to report over $500 "paid on behalf of or for services rendered by the candidate to any . . . partnership . . . in which the candidate . . . holds an interest of ten percent." It did not become effective until 1975. As candidate for Lieutenant-Governor in 1976, Rabbitt was required to disclose fees received during the preceding year. The money which Rabbitt allegedly received from the auto dealers was paid in 1973. Thus, the Campaign Disclosure Act was totally irrelevant to the last four counts.

The Government introduced five of Rabbitt's Disclosure reports, cross-examined him extensively about them, and contended that he had violated the disclosure statute (T. 426-27, 1050-52). Each report was sworn to by Rabbitt. The sting of this evidence was that defendant had committed five crimes of false swearing, and was certainly not a man to be believed. Yet, without the invalid counts, this evidence was both irrelevant and prejudicial. "[I]f evidence is admitted which is of little probative value but which is highly prejudicial to a defendant, there is a denial of due process of law, and he is entitled to a new trial." *United States ex rel. Springle v. Follette*, 435 F.2d 1380, 1382 (2d Cir. 1970); *accord, Manning v. Rose*, 507 F.2d 889, 894 (6th Cir. 1974).

It should not be overlooked that when the trial judge let this evidence in, he believed it to be directly relevant to the invalid counts. That should not be taken to mean that the trial judge would admit it on a retrial of the remaining counts. Under Rule 403 of the Federal Rules of Evidence, the trial court may exclude relevant evidence "if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence."

C. **The accused is entitled to the benefit of the trial court's exercise of discretion.**

Needless to say, the trial judge occupies the best position to determine whether justice requires the grant of a new trial.

> "A trial judge who has heard the evidence in the original case has a vast store of information and knowledge about it that the appellate court cannot get from a cold, printed record. Thus, as we said in *Cone*, the trial judge can base the broad discretion granted him in determining factual issues of a new trial on his own knowledge of the evidence and issues 'in a perspective peculiarly available to him alone.' 300 US, at 216, 91 L ed at 852. The special suitability of having a trial judge decide the issue of a new trial in cases like this is emphasized by a long and unbroken line of decisions of this Court holding that the [sic] the exercise of discretion by trial judges in granting or refusing new trials on factual grounds is practically unreviewable by appellate courts." *Neely v. Eby Construction Co., Inc.*, 386 US 317, 18 L ed 2d 75, 87 S Ct 1072 (1967), dissent of Justice Black, 386 US at 337-8.

It is most incongruous that now, after the district court had been given appellate guidance on the law of the case, it has been foreclosed from giving the case further consideration, except on resentencing.

This means that, based solely upon a printed record, the appellate tribunal has usurped the discretion best exercised by the trial judge who witnessed the proceedings and saw their impact upon the jury.

It is respectfully suggested that in all cases wherein an appellate court reverses convictions on some counts, and fails to order a new trial on the other counts, the spirit and intent of Section 2106 of Title 18 requires that the matter be remanded to the

trial court for its determination whether justice demands the grant of a new trial.

The fact that an accused might appeal from the district court's denial of a new trial should be no obstacle. No more needs to be done to position the matter for ruling; and it could be dealt with summarily—perhaps within no more than a month. Such delay is insignificant when it is weighed against requiring "such further proceedings to be had as may be just under the circumstances."

II

Does the indiscriminate introduction of local constitutional provisions, statutes, ordinances, disciplinary rules, and codes of conduct into federal mail fraud prosecutions violate due process when the matter introduced is general in tenor and the relevance is slight.

The indictment alleged that:

> "From January 1, 1975, until the date of this indictment, § 130.035, Missouri Revised Statutes, provided in pertinent part:
>
> "Every candidate shall file reports in writing [with the Missouri Secretary of state] . . . Each report shall set forth:
>
> (5) A specific listing of the source, by name and address, of any gifts or income in excess of one hundred dollars received by the candidate or the candidate's spouse or minor children during the preceding twelve months or the time of the last report, whichever is later; . . .
>
> (6) A specific listing of the source, by name and address, of any gifts, salaries, fees, or other income

> which for the twelve-month period preceding the filing date individually or in the aggregate exceeds five hundred dollars which has been paid on behalf of or for services rendered by the candidate to any sole proprietorship, partnership or corporation in which the candidate or the candidate's spouse holds an interest of ten percent or more.

"At all times material herein, § 558.110, Missouri Revised Statutes, provided:

> Every person exercising or holding any office of public trust who shall be guilty of willful and malicious oppression, partiality, misconduct or abuse of authority in his official capacity or under color of his office, shall, on conviction, be deemed guilty of a misdemeanor.

"From January 1, 1971, to the date of this indictment, Rule Four, DR8-101, Code of Professional Responsibility, Missouri Supreme Court Rules, states as follows:

> 'Action as a Public Official
>
> '(A) A lawyer who holds public office shall not:
>
> (1) Use his public position to obtain, or attempt to obtain, a special advantage in legislative matters for himself or for a client under circumstances where he knows or it is obvious that such action is not in the public interest.
>
> (2) Use his public position to influence, or attempt to influence, a tribunal to act in favor of himself or of a client.
>
> (3) Accept anything of value from any person when the lawyer knows or it is obvious that the offer is for the purpose of influencing his action as a public official.

Defendant's timely Motion to Strike these statutes and this disciplinary rule was overruled. Over objection, the Government introduced the statutes and rule as evidence (Gov't Exhs. 75-77; T. 622-28).

These statutes, and this rule, added nothing to the jury's understanding of the concept of fraud. Their introduction was confusing to the jury and prejudicial to the defendant. The problems which they created in this case are endemic to the practice of permitting the introduction of such local provisions, and demonstrate that use of a local regulation should be permitted only when it is specifically related to the case, and its relevance is great.

It was the Government's position in this case that certain legal fees paid by the architects to defendant's law partner, Joseph Dickerson, as legal fees were in fact disguised payments for assistance in obtaining state work.[3] Defendant introduced Dickerson to the architects, and suggested to him that he bill them on his own stationary, and deposit the fees in his own account, and write checks to the law firm in the same amounts.[4]

Defendant testified that he listed Dickerson, and not the architects, as the source of these fees because Dickerson performed the services and, in defendant's opinion as a lawyer, he was only required to report those fees generated by his own services (T. 1050-1051). The United States Attorney, by his questions and comments, let the jury know that, as a lawyer, this was not *his* opinion, and that, in *his* opinion, *all* fees to the firm had to be disclosed (T. 1051-1053).

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[3] This "position" was hotly disputed by defendant with evidence that Dickerson performed substantial legal services for the four architects (T. 1150-53).

[4] Defendant testified that the reason for this arrangement was "I didn't want my name to be on a check that they could take that check to Jefferson City and wave it around and say, 'Look who our lawyer is. You better give us some business' " (T. 989-90).

Over objection, the Court instructed the jury:

> "In relation to Counts I through X, and Count XIV, of the indictment, Missouri State Statutes, an Ethical Rule of the Supreme Court, and the oath of office of the defendant have been introduced into evidence."
>
> "This rule, these laws, and the oath of office of the defendant may be considered by you to determine the standard of conduct expected of the defendant by the citizens of the State of Missouri. They may also be considered by you as relevant to the defendant's intent to defraud, if any such intent existed. These are the only reasons that you may consider this rule, these laws, and this oath." (T. Vol. VII at 105-106).

If defendant did *not* violate the Campaign Disclosure Act, then that Act was *not* "relevant to the defendant's intent to defraud." If he was *not* guilty of transgressing this state misdemeanor statute, then it was immaterial whether it was part of "the standard of conduct expected of the defendant by the citizens of the State of Missouri." The treshold question which the jury had to determine, before "considering" the Campaign Disclosure Act, was whether defendant had *violated* that act. The trial court in *United States v. Mandel*, 415 F. Supp. 997, 1009 (D. Md. 1976) (Emphasis added), discussing a similar allegation of the Maryland Code of Ethics, recognized that the Code was "admissible as evidence of the defendant's dishonest or fraudulent intent" *only* if the government could prove "an intentional *violation*" thereof.

The decision as to whether the defendant violated the state disclosure law depended on resolution of the legal question of whether that law required a lawyer-candidate to report fees paid to a firm in which he is a partner, by a client which he was responsible for bringing to the firm, but for whom he did no work. If the jury was to be permitted to "consider" this act, the Court

should have resolved this legal question, and instructed the jury as to the result. By submitting this issue to the jury without guidance, the Court invited the jury to decide whether defendant's interpretation of the law was correct, or whether the United States Attorney's legal opinion should prevail.

The same problem exists with regard to the open-ended submission of the disciplinary rule. Defendant, a member of the legislature, was charged with accepting money in return for using his "influence" with the head of division of the executive branch. Did this constitute "action as a public official"? This is a complex legal question. In this very case, the appellate tribunal held that, for purposes of the Hobbs Act, it is not (App. 23-25). But see *United States v. Mazzei,* 521 F.2d 639 (3d Cir. 1975). Whether the Missouri Supreme Court would interpret its own disciplinary rule in the same way is quite uncertain. Yet, the Court, by submitting this Rule to the jury without any guidance as to its interpretation, allowed the jury to speculate as to the proper resolution of a fine point of law.

What are the elements which a jury must find in order to convict an office holder of "willful and malicious oppression, partiality, misconduct or abuse of authority in his official capacity or under color of his office"? The drafting of proper instructions under that misbegotten statute would tax the wisdom of a Solomon. With regard to this statute, too, the trial court permitted the jury to become the "judges of the law as well as the facts."

Permitting the government to charge such statutes and rules in the indictment, and to introduce evidence of them in the trial, served no useful purpose in the first place. See *United States v. Mandel, supra* at 1009; *United States v. Wolfson,* 322 F. Supp. 798, 828-30 (D. Del. 1971), *aff'd,* 454 F.2d 60 (3d Cir. 1972). Inclusion of such matters in the indictment rendered it prolix and tedious. Introduction of the statutes and rules

themselves, and arguments between witnesses and counsel as to their interpretation, was most confusing, and tended to divert the jury from the true issues in the case.

With regard to instructions, the choices were to leave the jury to guess and speculate as to the meanings of the various state laws and rules (as was done here) or to complicate the jury's job enormously by requiring them to find various elements of state offenses as a preliminary to finding the elements of the federal offenses. It is, of course, "plain error" to fail to instruct a jury as to all the elements of an offense with which he is charged, *e.g., Screws v. United States,* 325 U.S. 91, 107, 65 S. Ct. 1031, 1038 (1945). And, it is not sufficient merely to state the elements; the court must also "adequately explain" them. *United States v. Achtenberg,* 459 F.2d 91, 97 (8th Cir. 1972). It has been held on numerous occasions that the mere reading of a statute does not constitute adequate instruction as to the elements of the crime created thereby, *e.g., United States v. Bryant,* 461 F.2d 912, 920 (6th Cir. 1972); *Jackson v. United States,* 348 F.2d 772, 773-74 (D.C. Cir. 1965); *Williamson v. United States,* 332 F.2d 123, 133-34 (5th Cir. 1964); *Campbell v. United States,* 167 F.2d 451, 453 (5th Cir. 1948).

There are numerous situations where the elements of a crime must be defined though that crime itself is not the offense charged. For example, in felony-murder cases, the jury must be instructed on the elements of the underlying felony. *United States v. Williams,* 463 F.2d 958, 962 (D.C. Cir. 1972); *Commonwealth of Virgin Islands v. Carmona,* 422 F.2d 95, 99 (3d Cir. 1970). Where a conspiracy to violate a specific statute is charged, the elements of that offense must be explained to the jury, *e.g., Sandroff v. United States,* 158 F.2d 623, 630 (6th Cir. 1946). It would appear that the same holds true for violations of the Travel Act. See 2 *DEVITT & BLACKMAR, FEDERAL JURY PRACTICE & INSTRUCTIONS* § 56.16

and Notes thereto. Although it is true that in the felony-murder situation the underlying felony is really itself an element of the offense, and the same might be argued as to the other examples, this is a distinction without a difference because the real question is the jury's understanding of the law involved.

But the alternative of setting out the elements of the state statutes, rules, etc., is equally unappealing. While the introduction of the statutes and rules themselves creates the possibility that the jury may convict a defendant simply because they believe he has committed one of the state offenses, highlighting those offenses by delineating thin elements would raise that possibility to a strong likelihood.

Another reason for refusing to permit the government to use a multiplicity of state statutes and rules against the defendant is that the defendant's burden is multiplied. In addition to defending himself against accusations of various violations of federal law, he must prepare and present defenses to charges of violations of various state statutes, rules, etc.

The problems presented by allowing the government to use state legislation to prove "fraud" are amply demonstrated in the instant case. At the time of trial, the Missouri Campaign Disclosure Act had been declared unconstitutional by a state trial judge, and defendant so informed the Court and prosecutor (Letter Memo. dated July 11, 1977). The government chose a course of action which, at the time, appeared to be a gamble that this decision would not stand up on appeal, and the trial court permitted the "gamble." As defendant predicted, the Missouri Supreme Court agreed with the trial court that the law's reporting provisions (the very provisions which the government claimed were transgressed by defendant) violated the right to privacy, and was therefore unconstitutional. *Labor's Educational & Political Club—Independent v. Danforth*, 561 S.W.2d 339, 350 (Mo. 1977). However, the government's "gamble"

turned out to be no gamble at all, for the appellate court simply ignored this issue.[5] The end result is that a federal jury was permitted to convict defendant of federal crimes for purported disobedience to an unconstitutional state law.

Morevover, the combination of the introduction of this statute and the instruction thereon constituted a "fatal variance" in that it permitted the jury to find a "scheme and artifice to defraud" based solely upon defendant's failure to list the fee without regard to the question of whether the payments to Dickerson were "kickbacks" or legitimate retainer fees. Even if the jury did not believe that there was any "10% arrangement," they could still have found defendant guilty because he violated this law. This was not the "scheme and artifice to defraud" charged in the indictment.

The "oppression in office" statute also created special problems.[6] This statute is so vague as to violate due process. It "fails to give a person of ordinary intelligence fair notice that his contemplated conduct is forbidden by the statute," and it "encourages arbitrary and erratic arrests and convictions." *Papachristou v. City of Jacksonville*, 405 U.S. 156, 162, 31 L. Ed. 2d 110, 115 (1972). "Living under a rule of law entails various suppositions, one of which is that '[all persons] are entitled to be informed as to what the State command or forbids'." *Ibid*. The statute is so vague that "'men of ordinary intelligence must necessarily guess at its meaning'." *Coates*

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[5] Had the Court of Appeals not ignored the issue, it would have been forced to accept the state court's decision that the statute was unconstitutional. *United States v. Brown*, 505 F.2d 261 (4th Cir. 1974).

[6] Inclusion of this statute in the indictment and the evidence was prejudicial for the additional reason that it describes the forbidden conduct as a "misdemeanor." Since neither the indictment nor the Court's charge informed the jury that defendant was charged with 15 felonies, the jury may have mistakenly believed they were only convicting him of misdemeanors.

v. Cincinnati, 402 U.S. 611, 614, 29 L. Ed. 2d 214, 217 (1971).

Again the jury was authorized to find that defendant owed the citizens of Missouri a duty to obey this statute, that he did not do so, and that that this constituted a "scheme and artifice to defraud." If the jury found that defendant was guilty of either "oppression," "partiality," "misconduct," or "abuse of authority," and that a mailing occurred in conjunction therewith, they were empowered to convict him without more.

Nor does the introduction of the state disciplinary rule escape without causing a special problem. There is no state statute making it a crime for a public official to engage in the conduct proscribed by this canon. By instructing the jury that they might consider violation of this canon as constituting a "scheme or artifice to defraud," the Court permitted them to find him guilty of a crime which a non-lawyer could not have been convicted of. The constitutional infirmity of such judicial legislation is easily seen when it is considered how a specific statute to this effect would fare. Would a statute which says that "any public official, who is also a lawyer, who accepts money in return for official action is guilty of a crime" pass muster? Obviously not. Adding the requirements of a mailing does not change the issue. Yet, the jury was allowed to convict the defendant just as if there were such a statute. This violated defendant's right to equal protection and, therefore, his right to due process. See generally *Bolling v. Sharpe*, 347 U.S. 497, 74 S. Ct. 693, 694 (1954); *Skinner v. Oklahoma*, 316 U.S. 535, 541-42, 62 S. Ct. 1110, 1113 (1942).

It is not Petitioner's contention that the government should *never* be permitted to introduce a state statute or rule in order to show a specific duty which a defendant has violated. For example, in *United States v. Bush*, 522 F.2d 641 (7th Cir. 1975), *cert. den.*, 424 U.S. 977 (1976), the defendant was the press secretary and director of public relations for Mayor Daley. Daley established a standard of conduct "that every department

head and staff member was prohibited from using his position as an employee of the City of Chicago to benefit personally." 522 F.2d at 645. There was also a state statute which required defendant to file "statements of economic interests." In the instant case, in dismissing mail fraud counts I-X, the Eighth Circuit distinguished the *Bush* case because of the existence of that statute and standard of conduct (App. A-17-A-18).

But, where, as here, the "duties" imposed are general in their tenor, and add absolutely nothing to the general concept of "fraud,"[7] whatever slight relevancy the government might claim is far outweighed by the prejudice and confusion caused by their injection into the case. In fact, even the appellate tribunal which heard this case were prejudiced thereby: "The evidence clearly shows that Rabbitt acted unethically and violated his canons as a lawyer, a candidate disclosure statute requiring disclosure of fees received during the preceding twelve months,[8] and possibly a Missouri law rendering 'partiality' or abuse in public office unlawful" (App. A-16-A-17).

This is far from an isolated problem. In *United States v. Brown*, 540 F.2d 364, 381 (8th Cir. 1976), the government used two misdemeanor statutes, a city ordinance, and an oath of office. The government introduced four state statutes and a city counsel rule in *United States v. Keane*, 522 F.2d 534, 553-57 (7th Cir. 1975). As seen previously, the government included part of the Maryland Code of Ethics in its indictment in *United States v. Mandel*. It is safe to assume that, unless and until the courts restrict the practice, United States Attorneys will inject state laws into every mail fraud case they try against local officials.

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[7] It is of course, not necessary to show that a defendant has violated a specific statute or rule in order to prove a "scheme" and artifice to defraud."

[8] The Court of Appeals made this finding in spite of the fact that the Missouri Supreme Court held that this provision to be unconstitutional.

To the best of Petitioner's knowledge, this is the first time that this Court has been asked to rule on this practice.[9] Petitioner earnestly urges to this Court that the use being made of local laws in highly publicized prosecutions of local officials is almost always highly prejudicial, has very little legitimate value, and is contrary to all previous standards of trying defendants only on the laws under which they are indicted. The theories by which the Department of Justice has been permitted to make federal cases out of corruption at the local level are tenuous at best. The indiscriminate injection of local laws into the trial of these cases cries out for the restraining hand of the Court.

CONCLUSION

This Court's guidance is needed to clarify whether Section 2106 of Title 18 permits an accused to be denied access to the forum best qualified to determine whether he has received a fair trial and, if so, under what circumstances; and the intervention of this Court is needed to curb the growing practice of indiscriminately injecting local statutes and rules into federal criminal trials when it causes the issues to be confused, the proceedings to be prolonged, and the federal courts to indirectly become a forum for trial of local crimes.

Respectfully submitted,

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November 27, 1978

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[9] The defendant in *United States v. Brown, supra,* did not seek certiorari. In the *Keane* case, one of the "questions presented" in the defendant's position referred to the issue in a vague way, but the point was not carried forward in the body of the petition.

Certificate of Service

I hereby certify that on this 27th day of November, 1978, three copies of the Petition for Writ of Certiorari were mailed to the Honorable Wade H. McCree, Solicitor General, c/o The United States Department of Justice, Washington, D.C.; and a copy was mailed to the United States Attorney for the Eastern District of Missouri, U.S. Court & Customhouse, 1114 Market Street, St. Louis, Missouri.

MORTIMER A. ROSECAN
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APPENDIX

APPENDIX A

United States Court of Appeals
for the Eighth Circuit

No. 77-1677

United States of America,
Appellee,

v.

Richard J. Rabbitt,
Appellant.

Appeal From the United States District Court for the Eastern District of Missouri.

Submitted: January 13, 1978
Filed: September 5, 1978

Before BRIGHT and HENLEY, Circuit Judges; and TALBOT SMITH, Senior District Judge.*

BRIGHT, Circuit Judge.

Richard Rabbitt appeals from a jury conviction on eleven counts of mail fraud in violation of 18 U.S.C. § 1341 (1976), and three counts of extortion and one count of attempted extortion in violation of the Hobbs Act, 18 U.S.C. § 1951 (1976). The district court sentenced Rabbitt to serve seven years' imprisonment and five years' probation and to pay $18,000 in fines. Rabbitt asserts several claims of reversible error revolving around two themes: (1) that adverse rulings of the trial judge concerning joinder and the admissibility of evidence rendered the trial unfair, and (2) that the prosecution failed to

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* TALBOT SMITH, United States Senior District Judge, Eastern District of Michigan, sitting by designation.

meet its burden of proof on certain essential elements of the case.

This prosecution calls into question Rabbit's allegedly corrupt conduct as a Missouri state legislator. This appeal compels us to consider again[1] the extent to which the federal mail fraud statute, 18 U.S.C. § 1341 (1976), and the Hobbs Act, 18 U.S.C. § 1951 (1976), may be employed by federal prosecutors as one means of bringing allegedly corrupt nonfederal officeholders to trial in the federal courts on criminal charges.

In this case we set aside convictions on ten mail fraud counts and one Hobbs Act extortion count and sustain convictions on one mail fraud count and three Hobbs Act counts.[2]

I. Background.

Richard Rabbitt was elected to the Missouri House of Representatives in 1960 and remained a member of the House until 1976. He served as majority floor leader from 1967 through 1972, when he became Speaker of the House. He remained

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[1] *See United States v. Brown*, 540 F.2d 364 (8th Cir. 1976); *United States v. McNeive*, 536 F.2d 1245 (8th Cir. 1976); *United States v. States*, 488 F.2d 761 (8th Cir. 1973), *cert. denied*, 417 U.S. 909 (1974).

[2] The 15 counts in the indictment may be summarized as follows: counts I-X, Berger-Field architects mail fraud counts generated by law firm statements and checks mailed to or by Berger-Field; count XI, Berger-Field-Hobbs Act count generated by Rabbitt's allegedly extortionate demand for ten percent of the fee on state contracts secured through his influence; count XII, S.B. 110-Hobbs Act count generated by the initial $5,000 payment on the $20,000 allegedly extortionate demand from Missouri automobile dealers for legislative assistance; count XIII, S.B. 110-Hobbs Act count generated by the subsequent $15,000 payment of the balance of the $20,000; count XIV, S.B. 110-mail fraud count generated by the mailing of a $5,000 check as a contribution toward the $20,000; and count XV, H.B. 1336-Hobbs Act count generated by Rabbitt's attempted extortion of law business from the trucking industry.

Speaker until he resigned in 1976 to campaign as a candidate for Lieutenant Governor of the state.

Rabbitt's responsibilities as majority floor leader included establishing the time of meeting and order of business of the House of Representatives. As leader, Rabbitt selected the calendar each day and generally assisted the Speaker. As Speaker, Rabbitt presided over the house-assembly, appointed all the members of all committees, including the chairmen of the committees, assigned all bills to committees, and performed other miscellaneous duties.

The criminal charges brought against Rabbitt relate to three occurrences during his public life: (1) his acceptance of an indirect payoff to assist Missouri automobile dealers in obtaining relief from an onerous inventory tax through passage of a measure called Senate Bill 110; (2) his unsuccessful demand for a payoff in the form of law business for assisting Missouri truckers to obtain a bill authorizing operation of heavier trucks; and (3) his agreement to assist the firm of Berger-Field-Torno-Hurley, Architects and Planners, Inc., to obtain State of Missouri architectural contracts.

A. Senate Bill 110—Auto Dealers.

Substitute Senate Bill 110 (S.B. 110), introduced in 1973, proposed a change in the *ad valorem* method of taxation of car dealers' inventories. According to the *ad valorem* system, car dealers were taxed a percentage of the value of the highest inventory during a regular four-month period each year. Legislation to change the tax to a standard amount on each new car sold had been introduced in previous sessions of the legislature but to no avail. Because the automotive industry believed the tax system proposed by S.B. 110 would be more equitable, the Missouri State Automobile Dealers Association decided in 1973 to make a concerted effort to have the bill heard, considered,

and passed in that year. The Association assigned Gene Worn, legislative liaison for the Greater St. Louis Automobile Dealers Association, to assist in lobbying to obtain House approval of S.B. 110.

After the Senate passed the bill with no particular difficulty, Rabbitt, in his capacity as Speaker, assigned the bill to the Local Government-Related Matters Committee, a committee generally favorable to the bill and chaired by a personal friend of Rabbitt. Worn spoke with the committee chairman who said the bill would have an early hearing. Worn then asked Rabbitt what, if anything, could be done to expedite the bill's passage. Rabbitt suggested that Worn retain additional legal counsel, recommending his close friend, John Connahan, an attorney and lobbyist.

Worn conferred with leaders in the Missouri State Automobile Dealers Association and the group decided to follow Speaker Rabbitt's advice. As the legislative session was nearing its close, the automobile dealers were concerned that their efforts to obtain this industry bill might not bring success in the House without full legislative cooperation. Worn contacted Conaghan, who agreed to speak with Rabbitt about the bill for a non-negotiable fee of $20,000. Worn hired Connaghan. Based on his experience in the legislature, Worn believed it was wise to follow a House Speaker's recommendation on legislation.

As a down payment, Ben Lindenbusch, a St. Louis automobile dealer, advanced $5,000 in the form of a personal check toward Connaghan's fee. Later the Motor Car Dealers Association of Greater Kansas City mailed a $5,000 contribution in the form of a check for Connaghan to Lindenbusch. Two other $5,000 checks were obtained. Worn delivered the additional $15,000 to Connaghan.

Connaghan performed no lobbying work. He gave this fee to Rabbitt, some directly and the remainder indirectly by check to

Rabbitt's law partner-brother, Peter Rabbitt. These funds were deposited in a special account available for withdrawal by Richard Rabbitt. The Rabbitts admitted receiving funds from Connaghan but claimed the money represented referral fees for law business previously assigned to Connaghan.

The record discloses that following the $5,000 down payment, S.B. 110 survived a committee hearing and passed the House. The Governor subsequently voided the legislation as unconstitutional.

As we have previously noted,[3] the incidents relating to S.B. 110 resulted in one count of mail fraud under the mail fraud statute, count XIV, and two counts of extortion under the Hobbs Act, counts XII and XIII.

B. House Bill 1336—Overweight Trucks.

On December 7, 1973, prior to the 1974 Missouri legislative session, George Burruss, a lobbyist for the Missouri Bus and Truck Association, visited defendant Rabbitt at the latter's law office. They discussed House Bill 1336 (H.B. 1336), a bill increasing the permissible weight of trucks on Missouri highways. Rabbitt was noncommittal about whether he would support H.B. 1336. Describing the meeting, Burruss testified:

> [W]e visited awhile, and at some point Mr. Rabbitt indicated that he had added some persons to the law firm and needed some more law business from maybe the truckers or trucking industry, words to that effect.

At the time Burruss did not accord any particular significance to the conversation.

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[3] *See* note 2 *supra*.

In mid-January 1974, during the legislative session, Burruss approached Rabbitt outside his office in the Capitol Building and asked why H.B. 1336 had not been assigned to a committee. Burrus testified that Rabbitt responded: "Because I haven't gotten any law business yet." Rabbitt ultimately assigned this bill to an unfriendly committee in which the proposed legislation was buried.

Based on this series of events, Rabbitt was charged with attempted extortion under the Hobbs Act, count XV.

C. **Berger-Field Architects.**

In 1965, Paul Hurley, a partner in the St. Louis-based architectural firm of Berger-Field-Torno-Hurley, Architects and Planners, Inc. (Berger-Field), and a long-standing personal friend of Rabbitt, approached Rabbitt on behalf of the firm and sought his help in securing architectural contracts for state construction work. Rabbitt offered, for a fee of ten percent from any resulting work, to introduce the firm to people who might be able to secure architectural contracts for it.[4]

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[4] Persons charged with the duty of selecting architects for Missouri state jobs testified that selection rested on merit and past performance, not on the basis of competitive bid. The state usually paid a standard six percent fee based on total cost. The method of selecting a firm depended on the size of the project. If a firm had done satisfactory work on a project previously, it would be rehired. The state director of planning and construction assigned small projects. He would solicit a proposal from one architect and, if it proved acceptable, that architect would be given the contract. Projects involving more than five hundred thousand dollars were assigned by a committee. The committee would select a firm after interviewing and evaluating architects chosen from a list of between 30 and 50 firms. For work at a state university, the Board of Curators would select a firm after hearing half-hour presentations by each of a number of firms.

The evidence indicates that Rabbitt recommended the Berger-Field firm as competent architects to persons[5] authorized to employ architects for state projects.[6]

During the course of the agreement, the firm credited Rabbitt for some state work it secured. Berger-Field specifically attributed two state projects and one large project from the University of Missouri it received to Rabbitt's influence. Rabbitt also instructed the firm on the procedure to obtain an additional appropriation needed to cover one of its state projects.[7] The firm paid Rabbitt's ten percent fee in cash[8] and later in the form of a $500 monthly retainer to Rabbitt's law partner, Joseph Dickerson, who would mail a monthly statement to the architects on either personal or firm stationery. When payment arrived, Dickerson would deposit the retainer in his personal account and write a check for a like amount to the law firm of Rabbitt, Rabbitt, and Dickerson. Dickerson did little work for the retainer. The evidence revealed that the architects paid Rabbitt ten per-

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[5] The persons were Mr. Paulus, Chief of Design and Construction for the State of Missouri; Mr. Wilkerson, Director of Prisons; Mr. Cooper, Director of Planning and Construction; and Mr. Roddy, alderman for the 17th ward in St. Louis. Some evidence in the record seems to indicate that Berger-Field also paid Roddy or Rabbitt 10 percent of the St. Louis city architectural contracts.

[6] The firm employed three techniques to notify Rabbitt of projects in which it was interested. Initially, the firm forwarded a list to Rabbitt. Otherwise it might send newspaper clippings of state projects to Rabbitt and city projects to Roddy. Finally, a member of the firm would review a copy of the capital appropriations bill listing capital improvement projects with Rabbitt and underline those contracts the firm would like to secure.

[7] The evidence indicated the necessary supplemental bill was processed in the routine manner for acquiring extra payments. However, Berger-Field received no funds from this supplemental appropriation.

[8] The firm instituted a scheme to generate the necessary capital by declaring bonuses and writing checks to that effect to the partners. The partners each cashed the checks and returned the money to the firm. An associate gave it to Rabbitt.

cent ($22,538) of the gross fees from both city and state contracts attributable to his influence. This money was paid either directly to Rabbitt or to Dickerson for the benefit of Rabbitt's law firm. In his defense, Rabbitt denied any payoff agreement and attempted to account for payments to the law firm as legitimate collections for law work done without formal billing in earlier years and as proper retainer fees.

The mailings of law firm retainer bills and checks in payment generated the ten mail fraud charges contained in counts I to X. The demand for the ten percent kickback generated an extortion count under the Hobbs Act, count XI.

II. **Motion to Sever.**

Rabbitt challenges his conviction on two theories of misjoinder. First, he contends that joinder of extortion counts in one situation with mail fraud counts in another constituted misjoinder. Second, he contends that joinder of counts relating to three different situations—S.B. 110, H.B. 1336, and Berger-Field—constituted prejudicial joinder. We do not agree.

A. **Misjoinder.**

Rule 8(a) of the Federal Rules of Criminal Procedure[9] establishes the standard for joinder of offenses. If the various counts refer to similar types of offenses or are based on the same transaction or on several transactions connected by a common scheme or plan, joinder is proper. 8 *Moore's Federal*

[9] Rule 8(a), Federal Rules of Criminal Procedure reads:

> Two or more offenses may be charged in the same indictment or information in a separate count for each offense if the offenses charged, whether felonies or misdemeanors or both, are of the same or similar character or are based on the same act or transaction or on two or more acts or transactions connected together or constituting parts of a common scheme or plan.

Practice ¶ 8.05[2]. Joinder of offenses under the federal rules is permissive. *Id.* at ¶ 8.05[1]. Misjoinder raises an issue of law. *Id.* at ¶ 14.02[1].

The facts of this case fit within Rule 8. All the offenses charged stem from misconduct while Rabbitt was a public official. The circumstances surrounding S.B. 110 and H.B. 1336 may appear unrelated to those surrounding Berger-Field. However, all three can be characterized as connected by a common plan. The charges all originate from Rabbitt's scheme to obtain money because of his power, authority, and influence as a legislator. The principals of the Berger-Field firm testified they sought Rabbitt's political influence as a legislator. The S.B. 110 and H.B. 1336 counts deal with Rabbitt's use of his position as a legislator. Rabbitt laundered his payoffs as legitimate legal fees. The offenses, although distinct, possess sufficient similarity to render joinder appropriate under Rule 8. *See United States v. Adams*, 434 F.2d 756, 759 (2d Cir. 1970); *Finnegan v. United States*, 204 F.2d 105, 109 (8th Cir.), *cert. denied*, 346 U.S. 821 (1953). *Cf. Schaffer v. United States*, 362 U.S. 511 (1960).

Under the circumstances, the district court did not err in refusing severance.

B. **Prejudicial Joinder.**

Rule 14 of the Federal Rules of Criminal Procedure[10] provides for relief from joinder which, while appropriate under Rule 8(a), results in undue prejudice to the defendant. The deter-

[10] The relevant provisions of Rule 14, Federal Rules of Criminal Procedure, read:

> If it appears that a defendant * * * is prejudiced by a joinder of offenses * * * in an indictment * * *, the court may order an election or separate trials of counts, grant a severance of defendants or provide whatever other relief justice requires.

mination of prejudice rests within the discretion of the trial court. 8 *Moore's Federal Practice* ¶ 14.02[1]. Denial of severance is not grounds for reversal unless prejudice and abuse of discretion are shown. *See Johnson v. United States*, 356 F.2d 680, 682 (8th Cir.), *cert. denied*, 385 U.S. 857 (1966).

Rabbitt urges that the Government's actual motivation in jointing counts on three separate transactions was to cumulate the evidence. To support this allegation, Rabbitt quotes from the Government's closing argument in which the prosecutor stated:

> [Y]ou are entitled to consider all the evidence that's been introduced in this case. You don't have to just single out that one particular matter [H.B. 1336 transaction]. You can consider it all.

We must reject Rabbitt's argument. Had the counts not been joined, the evidence demonstrating Rabbitt's corrupt conduct as a legislator would have been admissible as evidence of similar behavior in each of the separate trials. Thus the court's refusal to sever was not prejudicial and cannot be characterized as an abuse of discretion. *See United States v. Hastings*, No. 78-1116 (8th Cir. May 25, 1978); *United States v. Clayton*, 450 F.2d 16 (1st Cir. 1971), *cert. denied*, 405 U.S. 975 (1972).

III. Senate Bill 110.

The jury convicted Rabbitt on three counts in relation to S.B. 110. One was a violation of the mail fraud[11] statute and

[11] Relevant provisions of the mail fraud statute, 18 U.S.C. § 1341 (1976), read:

> Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, * * * for the purpose of executing such scheme or artifice or attempting to do so, places in any post office or authorized depository for mail matter, any matter or thing whatever * * * or takes or receives therefrom, any such matter or thing, or knowingly causes to be delivered by mail * * * any such matter or thing, shall be fined * * * or imprisoned * * *.

two were Hobbs Act violations.[12] Rabbitt makes the following challenges to these convictions: (1) that the Government's evidence was insufficient to establish mail fraud because the use of mails was not reasonably foreseeable; (2) that the district court erred in overruling his motion for judgment of acquittal on one Hobbs Act count as there was no evidence to establish an effect on interstate commerce; and (3) that the court erred in refusing to give any instruction on this theory of defense. We separately consider these claims.

A. Mail Fraud—Use of Mails.

To establish a violation of the mail fraud statute, 18 U.S.C. § 1341, the Government must prove "(1) a scheme to defraud, and (2) [a] mailing * * * for the purpose of executing the scheme." *Pereira v. United States*, 347 U.S. 1, 8 (1954); *United States v. Brown*, 540 F.2d 364 (8th Cir. 1976). In *United States v. Brown, supra*, 540 F.2d at 375-76, the court noted "the mailing element of the crime * * * consists of two requirements: (1) that the defendant caused the use of the mails and (2) that this use was 'for the purpose of executing' the deceptive scheme." The defendant need not specifically intend the use of the mails if such use was a reasonably foreseeable possibility in furthering the transaction. *Pereira v. United States*,

[12] Relevant provisions of the Hobbs Act, 18 U.S.C. § 1951 (1976), read:

> Whoever in any way or degree obstructs, delays, or affects commerce or the movement of any article or commodity in commerce, by * * * extortion or attempts or conspires to do so * * * shall be fined * * * or imprisoned * * *.

supra, 347 U.S. at 8-9. *See also United States v. Maze*, 414 U.S. 395, 399 (1973).

Rabbitt contends the use of the mails in connection with S.B. 110 was not reasonably foreseeable and consequently he should have been acquitted of the mail fraud charge relating to S.B. 110.[13] We disagree.

The Government established that the Motor Car Dealers Association of Greater Kansas City mailed a letter containing a $5,000 check to Lindenbusch. The check, which Worn delivered to Connaghan, was a contribution toward Connaghan's $20,000 fee. Worn served as a liaison for a statewide organization. He hired Connaghan on behalf of the entire group. A request for a $20,000 fee from an organization made up of members residing in different areas of the state would likely produce mailing of checks to make up the fee fund.

We think the evidence was sufficient to establish the mailing charged in the indictment as reasonably foreseeable, and we reject Rabbitt's claim to an acquittal on count XIV.

B. **Hobbs Act—Effect on Commerce.**

In *United States v. Brown, supra*, 540 F.2d at 371 (1976), we asserted that the three essential elements of an offense under 18 U.S.C. § 1951 were: "(1) that the defendant induced his victims to part with property; (2) that he did so by extortionate means; and (3) that interstate commerce was thereby affected."

Rabbitt contends that because Lindenbusch's $5,000 payment was in the form of a personal check drawn on his private

[13] Rabbitt does not attack the sufficiency of the evidence of a fraudulent scheme.

account, interstate commerce was not affected.[14] Additionally, any commerce connection was too remote to bring Rabbitt's conduct within the Hobbs Act. We reject this attack.

The plain language of the Hobbs Act proscribes extortion which "in any way or degree obstructs, delays, or affects commerce." *See* note 12 *supra*. The Supreme Court has stated that the Hobbs Act "speaks in broad language." *Stirone v. United States*, 361 U.S. 212, 215 (1960). The connection with interstate commerce need only be slight. *See United States v. Culbert*, 98 S.Ct. 1112 (1978). A threatened effect on interstate commerce is sufficient to bring the statute into play. *United States v. Staszcuk*, 517 F.2d 53, 59 (7th Cir.), *cert. denied*, 423 U.S. 837 (1975). If the resources of a business which affects interstate commerce are depleted and diminished as a result of extortion, then interstate commerce is affected. *United States v. Biondo*, 483 F.2d 635, 640 (8th Cir. 1973), *cert. denied*, 415 U.S. 947 (1974).

There can be no doubt that the Missouri State Automobile Dealers Association was involved in interstate commerce. The subject matter of S.B. 110 was the method of taxation of dealers' inventories of new cars which presumably had come through interstate distribution channels. Ben Lindenbusch, president of the association, testified he had participated in the decision to hire Connaghan and it became his duty to raise Connaghan's fee. In advancing the $5,000 payment, Lindenbusch was acting on behalf of the auto dealers association. Subsequently, the member automobile dealers reimbursed Lindenbusch. The association members were engaged in interstate commerce and their contributions were related to their business of selling automobiles. Lindenbusch's transaction as an agent for this organization establishes sufficient nexus with interstate commerce to bring the extortionate practice within the

[14] Rabbitt makes no attack on the adequacy of the Government's proof on the first two elements.

Hobbs Act. *See United States v. Brown*, 540 F.2d 364 (8th Cir. 1976); *United States v. Mazzei*, 521 F.2d 639 (3d Cir.), *cert. denied*, 423 U.S. 1014 (1975); *United States v. Staszcuk*, 517 F.2d 53 (7th Cir. 1974), *cert. denied*, 423 U.S. 837 (1975); *United States v. Biondo*, 483 F.2d 635 (8th Cir. 1973), *Cert. denied*, 415 U.S. 947 (1974).

C. **Jury Instructions—Theory of Defense.**

"A defendant is entitled to an instruction on his theory of the case if there is evidence to support it and a proper request is entered." *United States v. Brown*, 540 F.2d 364, 380 (8th Cir. 1976). However, the court is entitled "to use its own language in framing instructions." *United States v. Nance*, 502 F.2d 615, 619-20 (8th Cir. 1974), *cert. denied*, 420 U.S. 926 (1975). Consequently, it is sufficient if the charge to the jury adequately and correctly covers the substance of the requested instruction. *See United States v. Brown, supra; United Staes v. Nance, supra.*

Rabbitt contends that the district court erred in refusing to give any instruction on his theory of defense as to the counts dealing with S.B. 110. In refusing to give Rabbitt's proffered instruction,[15] the court stated, "I don't believe it is necessary to give it. I think it is covered by the instructions presently to be given by the court."

The instructions to the jury, taken as a whole, adequately advised that to convict on the S.B. 110 transaction the jury needed to find beyond a reasonable doubt that Rabbitt extorted money through Worn with the aid of John Connaghan.

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[15] Rabbitt offered the following instruction:

> Unless you are convinced beyond a reasonable doubt that the defendant directed Gene Worn to John Connaghan so that Connaghan could extort money from the automobile dealers, you shall find the defendant not guilty as to Counts XII, XIII and XIV.

We find no error in these instructions nor in the court's failure to adopt the tendered instruction of Rabbitt on this issue. *See United States v. Brown, supra*, 540 F.2d at 380-81; *United States v. Barrett*, 505 F.2d 1091, 1107 (7th Cir. 1974), *cert. denied*, 421 U.S. 964 (1975); *United States v. Nance, supra*, 502 F.2d at 619.

IV. **Berger-Field.**

Rabbitt's conviction on eleven counts relating to his association with Berger-Field included ten counts under the mail fraud statute and one under the Hobbs Act. Rabbitt contends that the district court erred in overruling his motion for judgment of acquittal on these counts because the Government's evidence failed to prove either mail fraud or extortion under the Hobbs Act. We agree and set aside these convictions.

A. **Mail Fraud—Sufficiency of the Evidence.**

According to this court in *United States v. Brown*, 540 F.2d 364, 374 (8th Cir. 1976), the mail fraud statute can be utilized to prosecute a public official "if he devises a scheme whereby bribes or kickbacks are accepted in the course of conduct of his office, since such conduct operates to defraud the citizens of his government of their right to his honest and faithful service."

This concept offers a broad interpretation of the mail fraud statute applicable in situations in which the official commits fraud in connection with an affirmative duty of his office. The concept of fraud upon the public may clearly fall within the ambit of the mail fraud statute where dishonest conduct by a public official directly implicates the functions and duties of that official's public office. Whether a showing of dishonesty on the part of a state official, outside his official duties, with no financial loss to the state constitutes a fraud upon the public

and thereby statutory mail fraud is, in our judgment, highly questionable. Every case of breach of public trust and misfeasance in office in connection with which some mailing has occurred does not and cannot fall within the confines of the mail fraud statute. In the instant case, we hold the evidence does not establish mail fraud within the federal statute.

The indictment charges, in essence, that Rabbitt defrauded the citizens of Missouri by accepting a ten percent commission on architectural contracts awarded to the Berger-Field firm and concealing or failing to disclose his interest in those contracts. The evidence clearly shows that Rabbitt acted unethically and violated his canons as a lawyer,[16] a candidate disclosure statute requiring disclosure of fees received during the preceding twelve months,[17] and possibly a Missouri law rendering "partiality" or abuse in public office unlawful.[18] But such violations, although bearing on intent to defraud, do not in and of themselves establish the substantive crime of mail fraud under 18 U.S.C. § 1341.

[16] Rule Four, DR8-101, Code of Professional Responsibility, Missouri Supreme Court Rules, states:

> Action as a Public Official
>
> (A) A lawyer who holds public office shall not:
>
> (1) Use his public position to obtain or attempt to obtain, a special advantage in legislative matters for himself or for a client under circumstances where he knows or it is obvious that such action is not in the public interest.
>
> (2) Use his public position to influence or attempt to influence, a tribunal to act in favor of himself or of a client.
>
> (3) Accept any thing of value from any person when the lawyer knows or it is obvious that the offer is for the purpose of influencing his action as a public official.

[17] Mo. Ann. Stat. § 130.035 (Supp. 1978) which became effective January 1, 1975, provides:

> 1. Every candidate shall file reports in writing [with the Missouri Secretary of State] * * *. Each report shall set forth:
> * * *
>
> (5) A specific listing of the source, by name and address, of any gifts or income in excess of one hundred dollars received by the candidate or the candidate's spouse or minor children during the preceding twelve months or the time of the last report, whichever is later; and
>
> (6) A specific listing of the source, by name and address, of any gifts, salaries, fees, or other income which for the twelve-month period preceding the filing date individually or in the aggregate exceeds five hundred dollars which has been paid on behalf of or for services rendered by the candidate to any sole proprietorship, partnership or corporation in which the candidate or the candidate's spouse holds an interest of ten percent or more.

[18] Mo. Ann. Stat. § 558.110 (1953) (repealed 1977, effective 1979) provides:

> Every person exercising or holding any office of public trust who shall be guilty of willful and malicious oppresion, partiality, misconduct or abuse of authority in his official capacity or under color of his office, shall, on conviction, be deemed guilty of a misdemeanor.

[19] In *United States v. Barrett*, 505 F.2d 1091 (7th Cir.), *cert. denied*, 421 U.S. 964 (1974), a county clerk in Chicago, who was responsible for obtaining voting machines and the insurance on them, received commissions on the insurance policies purchased by the county at his discretion. The only companies allowed in the pool to compete for contracts were those willing to supply kickbacks. The court speculated the city might have gotten lower rates equal to the amount of the kickback.

In support of its argument that Rabbitt's conduct constituted mail fraud, the Government relies on several cases in which the courts employed various combinations of factors to establish a scheme to defraud cognizable under the mail fraud statute. In each of these cases, the conduct deemed fraudulent deprived the public either of some potential tangible gain such as favorable contracts,[19] or of its right to honest and fair

dealing in the conduct of the office in question,[20] or of its right to disclosure of the officer's interest in the transaction at issue.[21]

We find none of these factors present in this case. The state officials who awarded architectural contracts did so on merit.[22] There is no evidence that Rabbitt's use of his friendship, position, and influence to aid Berger-Field in obtaining contracts resulted in inferior work, greater expense, or any other tangible loss to the citizens or state.

We also find no evidence that Rabbitt's conduct deprived the citizens of their right to honesty and fairness in the conduct of his official duties. Rabbitt did not, in his official capacity, control the awarding of state contracts to architects. There is no evidence that Rabbitt failed to carry out the duties and responsibilities of his legislative office or leadership positions for the

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[20] In *United States v. Brown*, 540 F.2d 364 (8th Cir. 1976), city building commissioner Brown's office regulated the awarding of contracts. Brown controlled the granting or denying of building permits and safety inspections to the people making payoffs.

In *United States v. Keane*, 522 F.2d 534 (7th Cir. 1975), *cert. denied*, 424 U.S. 976 (1976), an alderman in the City of Chicago, unbeknown to his constituents, used inside information to purchase property and subsequently voted favorably on action for improvement or sale of properties owned by him.

[21] In *United States v. Bush*, 522 F.2d 641 (7th Cir. 1975), *cert. denied*, 424 U.S. 977 (1976), the press secretary and director of public relations in the office of the mayor of the City of Chicago owned part interest in the company which he recommended and which ultimately received several city advertising contracts. Bush was under a duty imposed by Illinois state law to disclose his interest in any city contract. Additionally, a standard of conduct barred city officials from personally benefiting from city business. Bush concealed his interest in the advertising contracts made within the City of Chicago.

In *United States v. Brown*, *supra* note 20, Brown was under a duty imposed by state statute to disclose his interest in city contracts or work performed by the city.

[22] *See* note 4 *supra*.

sake of Berger-Field. In this respect, the case resembles *United States v. McNeive*, 536 F.2d 1245 (8th Cir. 1976), in which the chief plumbing inspector for the City of St. Louis accepted unsolicited gratuities from plumbing contractors. While McNeive benefited from his office in a reprehensible way, his conduct neither injured the Government nor affected the performance of his duties and therefore did not violate federal law. We held that McNeive did not commit fraud by defrauding citizens of a right to "honest and faithful service."[23]

Finally, Rabbitt was under no affirmative duty to disclose his interest. The Government refers to no standard of conduct applicable to legislators which clearly required disclosure of Rabbitt's interest in the Berger-Field contracts.[24] The candidate disclosure act applied to Rabbitt as a candidate for Lieutenant Governor, not to his services as a legislator. Thus, he did not deprive the citizens of any right to disclosure.

To affirm the convictions on the Berger-Field mail fraud counts would mean expansion of the statute beyond its application in prior political corruption cases. This we refuse to do.

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[23] In rejecting the Government's contention (which relied on several cases cited by the Government on this appeal), Chief Judge Gibson, writing for the panel, said:

> McNeive's acceptance of these tips could hardly be characterized as a scheme or artifice. * * * The record reflects that the City of St. Louis did not suffer any tangible or pecuniary injury from McNeive's practice since it received all the money to which it was entitled. There is no evidence that McNeive deviated from the plumbing code in any respect; on the contrary, many of the Government's witnesses described McNeive as a strict enforcer of the code. [536 F.2d at 1251-52.]

[24] We recognize that *United States v. Brown*, *supra* note 20, contains language suggesting that public officials in Missouri have an obligation to disclose any interest in contracts. The court in *Brown* relied, however, on a statute requiring disclosure by *city* officials. That statute is not applicable to the present case.

We hold that Rabbitt's motion for judgment of acquittal on mail fraud counts I through X should have been granted. Accordingly, we reverse his convictions on those counts.

B. **Hobbs Act—Sufficiency of the Evidence.**

The statutory definition of extortion is "the obtaining of property from another, with his consent, induced by wrongful use of * * * fear, or under color of official right." 18 U.S.C. § 1951. The evidence must establish the payment was made under some form of compulsion. *See United States v. Adcock*, 558 F.2d 397, 403 (1977). However, bribery and extortion need not be mutually exclusive. *See United States v. Hathaway*, 534 F.2d 386, 393 (1st Cir.), *cert. denied*, 429 U.S. 819 (1976). The existence of compulsion is determined by the mental state of the extorted party. *United States v. Adcock, supra*, 558 F.2d at 403. Rabbitt argues the Government failed to prove he compelled the victims to part with money either out of fear or "under color of official right."

1. **Fear.**

The Government alleges extortion by fear of economic injury. Fear of economic loss is sufficient to constitute extortion, *see Callahan v. United States*, 223 F.2d 171, 175-76 (8th Cir.), *cert. denied*, 350 U.S. 862 (1955); *Bianchi v. United States*, 219 F.2d 182 (8th Cir.), *cert. denied*, 349 U.S. 915 (1955), even if the interest threatened is only an anticipated one. *See United States v. Addonizio*, 451 F.2d 49 (3d Cir. 1971), *cert. denied*, 405 U.S. 936 (1972).

The record lacks any substantial evidence of "fear" as a basis for the Berger-Field payments to Rabbitt.[25] Neither did the

[25] At trial, each of the Berger-Field officials was asked why the firm made the 10 percent payments. Hurley stated the firm members believed if they did not pay Rabbitt, he would not introduce them, and they would have to find someone else. Field stated payments were made to a politician in exchange for his help. Torno stated that he thought failure to pay Rabbitt "was the same as failure to obtain any work from the state government * * * at least through that source." Berger stated Rabbitt had said he would help the firm and "do what he could to get the firm state work and charge a ten percent fee." Berger stated he thought if the firm did not pay it would not get Rabbitt's assistance "helping * * * get state work."

firm believe that state contracts could not be acquired without Rabbitt's introduction. Indeed, evidence indicated Berger-Field had secured state contracts prior to its agreement with Rabbitt and acquired other state contracts during the years here in question without Rabbitt's assistance. The evidence further indicates Berger-Field was a willing collaborator who sought and paid for Rabbitt's good words to influential people, thus giving Berger-Field access on a friendly basis to state officials who awarded architectural contracts on merit. The principals of Berger-Field all expressed anger, not fear, at hearing of Rabbitt's ten percent demand. One associate described the demand as "poor thanks" after their consistent political contributions and support. Nevertheless, they decided to pay.

2. **Under Color of Official Right.**

Extortion "under color of official right" incorporates common law extortion, the taking of money by a public official not due him or his office for the performance or nonperformance of an official function. The term includes the misuse of one's office to induce payments not due the person or his office. *United States v. Hathaway, supra*, 534 F.2d at 394. The official need not control the function in question if the extorted party possesses a reasonable belief in the official's powers. *See United States v. Hathaway, supra*, 534 F.2d 386; *United States v. Mazzei, supra*, 521 F.2d 639; *United States v. Braasch*, 505 F.2d 139 (7th Cir. 1974), *cert. denied*, 421 U.S. 910 (1975).[26]

[26] *Hathaway* involved a no-bid personal service contract over which the defendant had little, if any, control. However, the evidence

In the present case, the Government does not contend that Rabbitt possessed actual power to award contracts for architectural services within his legislative powers or that Rabbitt so intimated. The Government argues that Rabbitt possessed the apparent power to award contracts and that Berger-Field believed in Rabbitt's power to secure contracts for the firm. The evidence, however, does not support that argument. All the principals of Berger-Field knew Rabbitt did not award contracts in his official capacity. Each architect knew the most Rabbitt could do was recommend them to state contractors as qualified architects and thereby gain them a friendly ear. Moreover, while Rabbitt's influence obviously helped these architects obtain state jobs, no testimony established that any state contracting officer awarded any contract to Berger-Field because of Rabbitt's influence or that Berger-Field believed Rabbitt's introduction was enough to secure the work. The Government failed to prove

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clearly indicated the extorted party had a reasonable belief he had to pay the extorted amount in order to secure any contract. The defendant represented he was able to control the contracting involved.

The facts in *Mazzei* indicate defendant displayed an intimate knowledge of the state leasing procedure. At an initial meeting between defendant and Kelly, a person seeking to lease space to the Bureau of State Lotteries, defendant stated: "[I]t was the practice on all state leases that a ten percent of the gross amount of the rentals would be paid to a senate finance re-election committee." 521 F.2d at 641. During the course of a second meeting, on Kelly's premises, a representative of the Department of Property and Supplies appeared to inspect the premises. Defendant took an active part in the leasing process. He suggested the rental rate to be included in Kelly's proposal. When the proposal came in with a lower rate, defendant called Kelly and told him to include janitorial services and to charge the suggested rate. Without ever having submitted a higher proposal, Kelly was awarded the lease at the higher rate and requiring janitorial services. Ample evidence exists to support the conclusion that Kelly entertained a reasonable belief defendant controlled the awarding of state leases.

In *Braasch*, a police commander extorted protection money from liquor establishments. He controlled vice raids. His power to request protection money to place a tavern on a list of those guaranteed not to be harassed clearly arose from his official duties.

Berger-Field entertained a reasonable belief Rabbitt possessed effective control over the award of architectural contracts necessary to establish extortion "under color of official right" in violation of the Hobbs Act.[27]

The evidence received on this count is distinguishable from that on the S.B. 110-Hobbs Act counts. Control over legislation such as S.B. 110 was at the heart of Rabbitt's responsibility in his position as a legislator and House Speaker. We hold Rabbitt's motion for judgment of acquittal on Hobbs Act count XI should have been granted. Accordingly, we reverse his conviction on this count.

V. Fair Trial.

A. Evidence of Similar Acts.

The Government questioned Rabbitt and two other witnesses about money paid to Rabbitt's law firm to gain his support of other legislation. Some of these payments were disguised as retainers, with no law work performed—similar to the Berger-Field "legal retainers." Rabbitt contends the admission of this testimony into evidence denied him a fair trial. We do not agree.

Federal Rule of Evidence 404(b) permits evidence of other acts, similar to the conduct charged in the indictment, to prove "motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.[28] *See* 10 Moore's Federal Practice ¶ 404.21[2].

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[27] In view of our holding it is unnecessary to reach Rabbitt's contention that interstate commerce was not affected.

[28] Rule 404(b) reads:

> Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that he acted in

The evidence in question bore on issues relating to Rabbitt's method of obtaining money from parties interested in legislation and his scheme of laundering the funds as retainers. *See United States v. Adcock, supra,* 558 F.2d 397. The admission of such evidence rests within the discretion of the trial judge. 10 *Moore's Federal Practice* ¶ 404.21[2]. We have reviewed the record and find no error in admitting this questioned testimony. The district court refused admission of testimony of similar import regarding other incidents and, in our judgment, exercised extreme fairness to Rabbitt in ruling upon evidence of the kind here in question.

B. **Standards of Conduct.**

Rabbitt contends the admission of two state statutes and a section of the Attorney's Code of Professional Responsibility[29] into evidence denied him a fair trial.[30]

According to this court in *United States v. Brown, supra,* 540 F.2d 381, state statutes, ordinances, and codes establishing a standard of conduct are admissible evidence in a prosecution of a public official for mail fraud. An official's course of conduct in the face of such statutes is relevant to the issue of whether that official possessed the requisite intent to defraud the citizens of the state. *See also United States v. Keane,*

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conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.

[29] *See* notes 16, 17, 18 *supra.*

[30] Rabbitt's argument concentrates on the Berger-Field mail fraud counts which, in view of our ruling, need not be discussed. However, as we affirm the S.B. 110 mail fraud count, some comment is warranted.

supra, 522 F.2d at 553-57. The introduction of the statutes was relevant evidence on the S.B. 110 mail fraud count. We see no reason to deviate from the *Brown* standard in this case.

C. **Rabbitt's Correcting of Testimony.**

Rabbitt contends the court erred in not permitting him to correct an error in his testimony regarding the source of some money deposited in his checking account. We find no merit in Rabbitt's argument.

Rabbitt indicated the source of the deposited money was a bond he had cashed. Evidence indicated proceeds from the bond, in the form of an endorsed check, were used to purchase a coin collection and not deposited in his special account as Rabbitt had claimed. The court permitted Rabbitt to explain that he had inadvertently spoken falsely. Rabbitt apologized to the Government, the jury, and the court. Rabbitt was allowed to make his point; he was not permitted to continue going over it. Within the context of the entire trial, we cannot say the court's ruling constituted prejudicial error.

D. **Hearsay Evidence.**

In his direct testimony, Rabbitt asserted that part of the monies paid him by Connaghan represented a fee for services rendered in connection with Connaghan's representation of one Wayne England, who had sustained bodily injuries in an automobile accident. Connaghan served as England's attorney of record and settled the case for more than $20,000. In disputing the Government's evidence that a check for $2,000 represented the automobile dealers' payoff on S.B. 110, Rabbitt testified that he gave advice and counsel to England and that Connaghan paid him the $2,000 as his share of the fee earned on settlement. England died prior to this trial.

Wayne England's son, Charles, on rebuttal for the prosecution, testified that he had spoken to his father hundreds of times about the injury case and that he had never heard his father mention Rabbitt as his attorney. This testimony was admitted over Rabbitt's objection as hearsay. Mrs. Wayne England testified and supported the Government's position that Rabbitt had never represented her or her husband in the accident suit. Her testimony was received without objection.

Assuming without deciding that Charles England's testimony constituted inadmissible hearsay, in light of Mrs. England's testimony that Rabbitt never represented the England family on legal matters, especially not on her personal claim and her husband's as a result of the automobile accident, we must deem the error, if any, harmless. *See United States v. Wells*, 525 F.2d 974, 976 (5th Cir. 1976).

We have carefully considered all other challenges made by Rabbitt to the fairness of the trial and find them to be without substantial merit.[31] The record reflects that an able, conscientious judge fairly and calmly presided over this lengthy, hotly contested case, ably tried by counsel for the prosecution and the defense.

We also note that except for challenges to the fairness of the trial and rulings denying severance of counts, Rabbitt does not otherwise challenge the conviction on count XV generated by the events surrounding the overweight truck bill, H.B. 1336.

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[31] Both the record and the brief are unclear as to whether the issue challenging the jury instruction in the disjunctive on extortion under the Hobbs Act is confined to count XI involving Berger-Field or includes counts XII and XIII involving S.B. 110. Nevertheless, the indictment alleged and some evidence supported extortion by either fear or under color of official right in counts XII and XIII. Consequently, the trial court did not err in giving this instruction.

VI. **Summary.**

We affirm the convictions for mail fraud and extortion under the Hobbs Act generated by the S.B. 110 situation, counts XII, XIII, and XIV. We affirm the conviction for attempted extortion under the Hobbs Act generated by the H.B. 1336 situation, count XV. We reserve the convictions for mail fraud and extortion under the Hobbs Act, generated by the Berger-Field situation, counts I and XI inclusive.

We remand to the district court for entry of modified judgments. We deem it appropriate to vacate all sentences to enable the district court to resentence Rabbitt on the convictions which we have affirmed.

Affirmed in part, reversed in part, and remanded for further proceedings.

A true copy.

Attest:

CLERK, U.S. COURT OF APPEALS,
EIGHTH CIRCUIT.

APPENDIX B

United States Court of Appeals
For the Eighth Circuit

No. 77-1677 September Term, 1978

United States of America, Appellee,

vs.

Richard J. Rabbitt, Appellant.

Appeal from the United States District Court for the Eastern District of Missouri

The Court having considered petitions for rehearing en banc filed by counsel for appellant and counsel for appellee and, being fully advised in the premises, it is ordered that the petitions for rehearing en banc be, and they are hereby, denied.

Considering the petitions for rehearing en banc as petitions for rehearing, it is ordered that the petitions for rehearing also be, and they are hereby, denied.

October 27, 1978

APPENDIX C

United States Court of Appeals
For the Eighth Circuit

No. 77-1677 September Term, 1978

United States of America, Appellee,

vs.

Richard J. Rabbitt, Appellant.

Appeal from the United States District Court for the Eastern District of Missouri.

On consideration of motion of appellee for stay of issuance of mandate and motion of appellant for stay of issuance of mandate in this cause, it is now here ordered that the issuance of the mandate herein be, and the same is hereby, stayed for a period of thirty days from this date. If within that time there is filed with the Clerk of this Court a certificate of the Clerk of the Supreme Court of the United States that a petition for writ of certiorari has been filed, the stay hereby granted shall continue until the final disposition of the case by the Supreme Court.

And it is further ordered by this Court that appellant's motion to amend mandate in this cause be and the same is hereby denied.

November 14, 1978